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Supreme Court of the United States

OCTOBER TERM, 1940

NO. 771

BRITISH-AMERICAN OIL PRODUCING COMPANY, *Petitioner*,

vs.

D. M. BUFFINGTON AND C. R. SMITH, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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vs.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Writ of certorari to review the above cause should be denied, and in opposition to the petition for such writ, respondents, D. M. Buffington and C. R. Smith, submit the following:

OPINION OF THE COURT BELOW

The opinion rendered by the 5th Circuit on December 19, 1940, is reported in 116 F (2d) 363. The opinion of the District Court, which was affirmed by the Circuit Court, is not reported.

SUPPLEMENTAL STATEMENT OF THE CASE

J. J. Dorr, as the owner of Oil and Gas Leases covering a section of land in Ward County, Texas, entered into a contract with D. M. Buffington and C. R. Smith (R. 3-5), whereby Buffington and Smith, in return for drilling a test well on said land for oil and gas, and as consideration thereof, were to receive from Dorr certain cash payments, together with an undivided one-fourth interest in the leasehold estate, and if the test well was a producer, were to have the preference right to do all future drilling operations at the prevailing contract price, the provision in said agreement on which this suit is predicated being as follows:

> **"It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing contract price."**

Buffington and Smith, respondents herein, drilled the test well, which was a producer, and received by assignment from Dorr, a one-fourth interest in the leasehold estate. Thereafter, they conveyed a one-eighth interest in the leasehold estate to A. J. Gibson and Richard Hamm, each of whom received a one-sixteenth interest. In these assignments, Buffington and Smith expressly reserved to themselves the drilling rights given them in their contract with Dorr. Buffington and Smith thereafter drilled for themselves, Hamm, Gibson and Dorr, four more wells on said land, same being drilled by Buffington and Smith with cable tools at a price of $2.50 per foot. Hamm, Gibson and Dorr then assigned their interest to

British-American Oil Producing Company, so that said company became vested with a seven-eighths interest in the leasehold estate, Buffington and Smith retaining their one-eighth interest therein.

It is undisputed that British-American Oil Producing Company bought its seven-eighths interest with notice, both actual and constructive, of the aforesaid quoted provision in the contract, and with notice and knowledge that Buffington and Smith had drilled the five wells located on said land. Said company, without further ado, and over Buffington and Smith's objections, assumed the complete operation of the leasehold estate, and while said company at one time wired Buffington and Smith to submit a bid covering the drilling of Well No. 6 with rotary equipment (R. 157), said company's General Superintendent of Production acknowledged that the company never offered to let Buffington and Smith do the drilling at the prevailing contract price (R. 301). The company let a contract to McCutcheon Drilling Company for the drilling of five wells, said drilling company being the only bidder, and a former contractor for British-American Oil Producing Company, (R. 305, 306). British-American Oil Company, through said contractor, then drilled, during the pendency of this suit, twenty wells on said land, eighteen of the wells being drilled after Buffington and Smith filed suit in the District Court seeking enforcement of the contract and damages for breach thereof by the company.

The case was considered to be, and tried, as an equity case, but the court granted Buffington and

Smith's request for an advisory jury, and the jury, in answer to special issues submitted, found that there existed a prevalent, general, customary, recognized price in the area in question then paid per foot for the drilling of oil wells at the time the twenty wells were drilled, that such price was $2.50 per foot, that Buffington and Smith would have made a profit of $1,250.00 per well, or a total profit of $25,000.00 if they had drilled the twenty wells in question at such price (R. 74-75). The District Judge took the case under advisement, and after written briefs were submitted by the parties, entered judgment in favor of Buffington and Smith for $25,000.00 without prejudice to their right to assert a claim for damages on any additional wells drilled on said land by British American Oil Producing Company and rendered judgment in favor of said company on its cross-action against Buffington and Smith for $25,382.46, being one-eighth of the total sum he found British-American Oil Producing Company had expended on said lease, and offset one judgment against the other (R. 91-96). With the judgment, the court filed findings of fact and conclusions of law (R. 76-91). The court found, among other conclusions of law, that the contract with Dorr was a lawful one, that the provision giving Buffington and Smith the preference right to do all future drilling at the prevailing contract price was a part of the consideration given by Dorr to them for their agreement to drill the test well, that the provision was sufficiently certain and definite to support the cause of action, that if it was indefinite in any particular, it was rendered certain and definite on the trial of the cause, that it was not breached by

Buffington and Smith, that British-American Oil Producing Company took subject thereto and was bound thereby, that a mining partnership was in existence at the time said company purchased its interest in said lease, and that the provision sued on, if not a covenant running with the lease, was a profit a prendre, or equitable servitude and that British American-Oil Producing Company breached said provision to the damage of Buffington and Smith, the measure of damages being the loss of profits they would have made in the drilling of the wells.

British-American Oil Producing Company and Dorr moved for a directed verdict, moved to set aside the verdict of the jury and moved the court to render judgment for them. Motions were overruled and judgment was entered as aforesaid.

On appeal the United States Circuit Court of Appeals for the 5th Circuit (Justice Hutchison dissenting) affirmed, on December 19, 1940, in an opinion by Justice McCord, the judgment of the trial court, but eliminated the damages allowed as lost profits on the first of the twenty wells drilled by British-American Oil Producing Company, in the sum of $1,093.75, on the theory that Buffington and Smith were not in position to drill the first well, but were ready, able and willing to drill the other nineteen wells and reduced the balance of the recovery in favor of Buffington and Smith by one-eighth, on the ground that they would have been liable for their proportionate one-eighth of the drilling costs, thereby diminishing the judgment in favor of Buffington and Smith from $25,000.00 to $20,781.25,

which judgment was offset against that of British-American Oil Producing Company on its cross-action for $25,382.46, leaving judgment in favor of British-American Oil Producing Company for $4,601.21, instead of $382.46. Dorr was released from liability.

British-American Oil Producing Company filed a petition for re-hearing in the Circuit Court of Appeals on January 8, 1941, which was overruled on January 14, 1941. Said company then filed its application to this Honorable Court for writ of certiorari, and served Buffington and Smith with notice thereof.

NO BASIS FOR INVOKING JURISDICTION OF THE SUPREME COURT

As reasons relied on for the allowance of the writ, petitioner lists in its petition for writ of certiorari, twelve reasons, numbered, or designated, alphabetically from A to L, inclusive. In each instance it is recited that the decision of the Circuit Court of Appeals in this case, in some particular therein set out, is a decision of an important question of local law which is in conflict with local decisions, or with decisions of other Circuit Courts of Appeals, or with "applicable local and other decisions," or that the decision is an erroneous decision of an important question of local law, or that same is an erroneous decision of an important question of general law. In most instances, cases are cited without comment, but evidently with the purpose in mind of supporting the theory that the decision in the instant case

is in conflict with local decisions or with decisions of other Circuit Courts of Appeals.

In petitioner's brief, some, but not all, of these cases are discussed under alphabetical headings conforming to the alphabetical listing in the petition for the writ, the subject matter of such headings in the brief being substantially the same as the subject matter thereof in the petition.

It is apparent that the principal theory advanced by petitioner to sustain the jurisdiction of this Honorable Court is the theory that the decision in the instant case, as rendered by the 5th Circuit Court of Appeals, is in some particulars a decision of an important question of local law which is in conflict with local decisions, it evidently being petitioner's purpose to attempt to invoke the jurisdiction of this Honorable Court under the provisions of Rule 38, Subsection (b) of sub-section 5. Yet, in few, if any, instances in petitioner's brief, do we find even any attempt to show the existence of an actual conflict between the decision in this case and the decision of Texas cases, or any other cases. In this case, as well as in cases of like nature, the decision must ultimately rest on the facts and circumstances of the case, and as an example of what we are talking about, we point out that, while petitioner has cited a number of cases under Section A of its reasons for allowance of the writ, in an effort (to show that the decision of the Circuit Court of Appeals to the effect that the contractual provision upon which respondents predicate their case, is not too incomplete, indefinite and uncertain in its terms to support the

judgment rendered), is an erroneous decision of an important question of local law and conflicts with local applicable decisions, yet none of the cases so cited relate to the subject matter at hand, and all are but evidence that each case, as to certainty of the contractual provision, or otherwise, must stand or fall upon its own particular fact situation.

We shall hereinafter list in alphabetical order, corresponding with the order in petitioner's brief, points, or summaries of argument controverting those in petitioner's brief, and will endeavor, in our argument in support of such points to not only answer the argument of petitioner, but to show that none of the Texas or Federal cases cited by petitioner conflict in any way with the decision of the 5th Circuit Court of Appeals in this case, and to show that petitioner has failed to establish any ground sufficient to invoke, support or sustain the jurisdiction of this Honorable Court.

ARGUMENT

SUMMARY OF ARGUMENT

Point A.

The words giving respondents the preference right to drill are plain, and necessarily relate only to the leases which were the subject matter of the contract, and the term "prevailing contract price" simply means the price generally paid in the area, the prevalent, general, customary, recognized price, and necessarily could refer only to the area in which such leases were located. The phrase "prevailing contract price" having a definite meaning, the covenant fixed such price as the price to be paid, and if the parties were not able to agree as to what the prevailing contract price in the area was, it was subject to proof on the trial of the cause, and was proved by the testimony of respondents' witnesses, who testified as expert drilling contractors with reference thereto (R. 213, et seq.) (R. 223, 224, et seq). British-American Oil Producing Company offered no testimony to controvert such evidence as to the existence of a prevailing contract price, but merely tried to show the prices quoted were either competitive prices, or prices paid to favored contractors (R. 232). Whether one or the other, however, or both, the prevalent, general, recognized, customary price paid in the area would be the prevailing contract price.

Point B.

In fixing the price to be paid, respondents for the drilling of the wells on said land by giving them the

preference right to do such drilling "at the prevailing contract price," the contract fixed, or furnished a key for the determination thereof. If the parties were unable to agree as to the prevailing contract price, the same could be, and was, determined by proper evidence as to the existence and amount thereof. That the contract is not full and complete as to details is no reason to strike it down, but the same will be sustained if the meaning of the parties can be determined under the rule that that is certain which can be made certain. *Elliott on Contracts*, Volume 1, Page 8; *Dale Oil Refining Company v. City of Tulsa*, 25 S. W. (2d) 671 (Texas); *Bulger v. Ray*, 239 S. W. 259 (Texas); *Memphis Furniture Manufacturing Company v. Wemyes Furniture Company*, 2 Fed. (2d) 428 (6th CCA); *F. S. Royster Guano Company v. Hill*, 68 Fed. (2d) 533 (4th CCA); *Southwest Pipeline Company v. Empire Natural Gas Company*, 33 Fed. (2d) 248 (8th CCA).

Point C.

The following wire or telegram from British-American Oil Producing Company to Buffington and Smith, to-wit:

> "WE PLAN TO DRILL REMAINDER OF WELLS ON OUR RECENTLY PURCHASED PAYTON LEASE IN PECOS COUNTY USING PORTABLE ROTARY OUTFIT STOP PLEASE SUBMIT YOUR BID IMMEDIATELY COVERING THE DRILLING OF THESE WELLS WITH THIS TYPE EQUIPMENT";

was not a tender of the drilling at the prevailing contract price but was a request for bids. Buffington

and Smith were not required to bid competively for the right to do the future drilling at the prevailing contract price, this right having been obtained in their agreement with Dorr.

Point D.

Buffington and Smith's telegraphed reply to the aforesaid telegraphed request for bids from the British-American Oil Producing Company to them, said reply telegram reading as follows:

> "OUR DRILLING AGREEMENT DOES NOT REQUIRE US TO USE PORTABLE ROTARY MACHINE STOP WE ARE READY TO BEGIN THE DRILLING OF A WELL ON SUITABLE LOCATION ON OUR LEASE AT PREVAILING PRICE IN ACCORDANCE WITH OUR CONTRACT";

was not a breach of the covenant sued on, as the telegram to them from British-American Oil Producing Company was not an offer to permit them to do the drilling at the prevailing contract price, but was only a request for bids. Even, however, if it could be argued that the telegram from British-American was an offer to Buffington and Smith, Buffington and Smith's telegraphed reply thereto was not a breach of the covenant sued on but only a refusal to bid for such right, and only questioned the right of British-American to require the use of a rotary machine. Same was squarely within the principles of law set out in 10 *Texas Jurisprudence*, Section 266, page 495, as follows:

> "* * * a contention or controversy over the terms of a contract or the construction to be placed upon

it and a refusal to perform in a particular manner or in some specific feature by one of the parties, is not such a renunciation or abandonment as will authorize the other party to treat the contract as rescinded or breached * * *".

Point E.

Necessarily the prevailing contract price was based upon the price paid favored contractors in the area, as well as the price paid contractors competitively bidding for the work. Testimony from both favored contractors and contractors bidding on a competitive basis was introduced by Buffington and Smith in the trial of the case (R. 213, 223, 224.), and from this testimony the jury and the court determined the prevailing contract price.

Point F.

Under the contract sued on, Buffington and Smith were given the right to do all future drilling at the prevailing contract price; having this right, the fact that they could make a profit on doing this drilling at the prevailing contract price violates in no way the general principle of law that one partner cannot profit in the performance of business on behalf of his associates.

Point G.

British-American Oil Producing Company, having purchased its interest with notice and knowledge of the contract and the operations thereunder, took subject thereto and is bound thereby, a mining partnership then being in existence.

Point H.

A provision in the contract giving Buffington and Smith the preference right to do all future drilling was a covenant running with the leases to which same related, and not a personal covenant, and said company, having acquired its interest in such leases with knowledge and notice thereof, took subject thereto and is bound thereby. *Summers on Oil and Gas*, Section 553, p. 303; *American Refining Company v. Tidal Western Oil Corporation*, 264 S. W. 335 (Error refused by Texas Supreme Court.).

Point I.

The provision in the contract sued on, if not a covenant running with the leases, is at least a profit a prendre or equitable servitude which attaches to the leases, and British-American Oil Producing Company, having bought with notice and knowledge thereof, should be and is bound thereby. *Anderson v. Rowland*, 44 S. W. 911 (Texas); *Graham v. Omar Gasoline Company*, 253 S. W. 896 (Texas); *Southwest Pipe Line Company v. Empire Natural Gas Company*, 33 Fed. (2d) 248; *Sims v. Southern Pipe Line Company*, 195 S. W. 283 (Error refused by Texas Supreme Court); *American Refining Company v. Tidal Western Oil Corporation*, 264 S. W. 335 (Error refused by Texas Supreme Court).

Point J.

An oil and gas lease, through creating a determinable fee estate, is in the nature of a lease and not a deed, and the British-American Oil Producing Company, having

purchased its interest in the leases with notice and knowledge of the contract relating thereto, took subject thereto and is bound thereby. *Pierce Fordyce Oil Association v. Woodrum*, 188 S. W. 243 (Texas).

Point K.

If any partnership was in existence, it was a mining partnership, and under mining partnerships, as distinguished from general partnerships, the rule is that one mining partner may maintain an action against another partner without suing for a dissolution of the mining partnership and without an accounting. *Gilbert v. Fontaine*, 22 Fed. (2d) 657; *Indiohoma Refining Company v. Wood*, 255 S. W. 212 (Texas); *Moss and Urchell v. Clark*, 82 S. W. (2d) 1090 (Texas); *Greene v. Condor Petroleum Company, et al.*, 140 S. W. (2d) 844.

Point L.

There was no necessity for Buffington and Smith to make any disclosure of, or to account for, the profits derived by them from their drilling operations. Drilling contractors ordinarily have a number of drilling contracts on hand at one time and usually are engaged in drilling, at one time, a number of wells, so that the breach of one of such drilling contracts by one owner would not require the drilling contractor to offset his damages sustained by such breach with profits obtained in the drilling by him of the other wells under his other contracts.

Even should the rule that damages must be minimized by obtaining other work be applicable to the

breach of drilling contracts, the burden was on British-American Oil Producing Company to show the amount by which damages should be diminished and this it failed to do.

ARGUMENT IN SUPPORT OF POINTS A and B

While petitioner lists a great many cases in its petition under its Points A and B, it quotes in its brief under such points only one case. Nevertheless, in an effort to show that none of these cases cited by petitioner conflict with the decision in the instant case as rendered by the Circuit Court of Appeals, we wish to discuss briefly each Texas and Federal case cited by petitioner:

The first Federal case, that of *Winn et al. v. McCarthy, et al.*, 97 Fed. (2d) 964, involved the enforcement of a contract by a buyer to purchase goods from the seller, some of which were to be bought on buyer's personal account, and some on a consignment account. The court refused to enforce the contract because, under the contract, the buyer was to designate into which class the goods purchased would fall, but never made such classification. It is interesting, in this connection, however, to note that the agreement provided for the payment of such goods at *prevailing* factory prices. No point was made that this phrase was indefinite in any particular, and the special master in the case ascertained and set out such prevailing factory prices, and reported same to the trial court.

The case of *American Life Marine Insurance Company v. Letton*, 9 Fed. (2d) 799, involved simply an agreement for employment, which was based on certain conditions never performed.

The case of *Jordan, et al. v. Buick Motor Company, et al.*, 75 Fed. (2d) 447, involved an agreement for an exclusive sales agency of the Buick products. The agreement was correctly stricken because it involved no details whatsoever, and in view of the ordinary complications arising under a sales agency contract and the unusual nature thereof, it was held the simple agreement for exclusive sales agency without any further particulars was too indefinite for enforcement.

In the case of *Spivy et al. v. Saner-Ragley Lumber Co., et al.*, 284 S. W. 210 (Tex. Comm. App.), it was correctly held that a contract giving plaintiff the right to install 75,000 cups on turpentine trees for one year was definite and certain, but that the portion of the contract in which it was provided that the number of cups for the next year were to be agreed upon in the future, was simply an agreement to make a future agreement and not enforceable.

In the case of *Radford v. McNeny, et al.*, 104 S. W. (2d) 472, brokers sued for a commission on a lease contract obtained by them for lessor. Lessor, however, had agreed to sign such a contract and pay them a commission only if the terms were agreeable to him. Clearly, this contract was not enforceable.

In *Canady, et al., v. Martin, et al.*, 98 S.W. (2d) 1009, (Tex. Comm. App.), plaintiff sought to enforce the

agreement of the defendant to erect a brick building. Inasmuch as the agreement provided no specifications whatsoever, but simply recited that the defendant would erect a brick building, the court necessarily held same to be too uncertain for enforcement.

In the case of *Haskell Motor Company v. Remington*, 25 S. W. (2d) 913, (Tex. Comm. App.), one party contracted to do painting in payment of a note. The agreement was held not to be enforceable, because it was too uncertain and varied the terms of a written instrument.

In *Texas Employers' Ins. Assn. v. Moore*, 56 S. W. (2d) 653 (Tex. Comm. App.), defendant wrote plaintiff he had work to offer him providing he could report at once to his foreman. Plaintiff reported but was denied work, and the court held he had no enforceable contract, as he still had to contract for work after reporting to the foreman.

In *Brooks v. Federal Surety Co.*, 24 Fed. (2d) 884, an agreement in which one party agreed to buy coal from another party for such price as he might sell it, less ten per cent, was held to be too indefinite and to lack mutuality, the price not being certain and being entirely within the discretion of one of the parties. By inference, the court indicated that if the agreement had been to purchase same at the market price, less ten per cent, which is a price that could be determined, just as the prevailing contract price can be determined, the same would have been enforceable.

We have discussed each and all of the foregoing cases cited by petitioner to show that none of the de-

cisions in which certain contracts therein construed were held to be too indefinite and uncertain in their terms to support a cause of action, conflict in any way with the decision rendered by the Circuit Court of Appeals in the instant case that the covenant sued on in this case was sufficiently definite and certain to support the judgment rendered. It is very obvious that the question in each instance as to whether the contract was certain, depended upon the nature of the contract itself and the facts surrounding same, and none of the cited cases in any way are applicable to the case at bar.

The provision in the contract sued on in the instant case is sufficiently definite and certain, in that, while it does not fix the location of the wells or the size of the hole, or who is to furnish fuel or water, or which party is to furnish and erect the derrick, it does specifically give to plaintiffs the preference right to drill future wells at the prevailing contract price, which certainly is language readily understood by those engaged in the petroleum industry. As a matter of fact, the details in most drilling contracts are about the same; that is, it is customary for the owner to determine the size of the hole, its location, the casing pattern, etc., and customary for the contractor to furnish the fuel, water, insurance, etc. This is acknowledged impliedly by British-American Oil Producing Company in that their request by telegram to Buffington and Smith for a bid on future drilling operations (R. 157) lacks the very essentials about which the company complains, yet it considered same sufficient to enable Buffington and Smith to furnish a bid thereon.

Even if the contractual provision sued on could be said not to be certain and definite in all its details, such definiteness and certainty may be supplied by evidence under the theory that that is certain which can be made certain. *Elliott on Contracts*, Volume 1, Chapter 8; *Dale Oil Refining Company v. City of Tulsa*, 25 S. W. (2d) 671 (Tex. Civ. App.); *Bulger v. Ray*, 239 S. W. 259 (Tex. Civ. App.).

Evidencing the same rule is the Federal case of *Memphis Furniture Manufacturing Company v. Wemyes Furniture Company*, 2 Fed. (2d) 428 (6th CCA), in which a contract by defendant to purchase from plaintiff some furniture subject to "*prices prevailing* at the time of shipment, and subject to our (plaintiff's) ability to ship," was enforced by the court at the instance of plaintiff, the court holding that the phrase above quoted was one which could be rendered certain by proof as to such prevailing price.

Likewise, in the Federal case of *F. S. Royster Guano Company v. Hill*, 68 Fed. (2d) 533 (4th CCA), defendant's agreement with plaintiff "to give plaintiff employment for life at top wages for common labor" was enforced, the court holding that the phrase was sufficiently definite to be made certain.

Again, in the case of *Southwest Pipeline Company v. Empire Natural Gas Company*, 33 Fed. (2d) 248 (8th CCA), the court, in holding a contract of the plaintiff to purchase gas from the vendor of the defendant "in the usual conduct of its business ratably with other producers in the same field having gas in the same producing horizon or sand, and in accordance with ap-

proved practice in the industry" to be sufficiently definite and certain to support a cause of action, the court said:

> *"A contract need not contain definitely and specifically each fact in detail to which the parties may be agreeing. If the phrase used can be made certain by proof that is sufficient . . . It is couched in language appropriate to the approved practices of the established pipeline business and well understood by those engaged in the oil and gas industry. The phrase, 'in the usual conduct of its business' can be interpreted in the line of evidence as to what that conduct was."*

We also call your attention, in this connection, to *Article 5159A* of the Texas Revised Civil Statutes of the State of Texas, which has been held to be constitutional, and which provides that on public projects "not less than the *general prevailing rate* per diem wages for work of a similar character of the locality in which the work is performed . . . shall be paid to all laborers . . . employed by or on behalf of the State of Texas."

In fact, a provision very similar to the one sued on in the instant case, was sustained as being sufficiently definite and certain in the case of *D. D. Mickleson v. Gypsy Oil Company, et al.*, 238 Pac. 194, an Oklahoma case, in which the right to do all future drilling was upheld.

Certainly, in the instant case, the term, "prevailing contract price" was fixed with certainty and definiteness by the testimony of drilling contractors who were respondents' witnesses. (R. 213, 223, 224).

ARGUMENT IN SUPPORT OF POINTS C and D

Petitioner cites a number of Texas and Federal cases under reason C of its reasons relied on for the allowance of the writ, but in its brief, discusses only one of these cases, namely, that of *Minneapolis and St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149. **Here again, we can find nothing in petitioner's brief, or in its petition, to indicate any conflict between the decision of the Circuit Court of Appeals in the instant case with applicable local and other decisions.** In the above case, defendant offered to sell plaintiff 2000 to 5000 tons of rails at a certain price. Plaintiff replied that it would buy 1200 tons and ordered same. Defendant refused to deliver 1200 tons for the price quoted by it for 2000 to 5000 tons, and the court necessarily held that the plaintiff, having materially varied in its acceptance the offer of the defendant, refused the offer of the defendant, so that no contract was consummated, the defendant not having accepted the counter offer of the plaintiff.

The hereinbefore described wire, or telegram, from British-American Oil Producing Company to respondents asking for a bid for the drilling of a well, was not an offer to permit respondents to do such drilling at the prevailing contract price, but was simply a request for bids. The contract gave respondents the preferential right to do such drilling at the prevailing contract price and they were under no obligation to submit a bid. Consequently, there was no breach by respondents of the covenant giving them such right—either by the telegraphed reply made by them to peti-

tioner (R. 158), or otherwise—for the reason petitioner never gave them an opportunity to perform the preferential right to do such drilling.

Mr. Wright, General Superintendent for British-American Oil Producing Company, admitted that respondents advised him they would do the drilling at the prevailing contract price (R. 301); that his company never offered to let the respondents do such drilling at the prevailing contract price (R. 301); that he never told respondents what he thought the prevailing contract price was (R. 305); that McCutcheon, his company's contractor, who had drilled for the company before (R. 304) was the only contractor from whom his company got a bid (R. 306); that he never told respondents of the bid made by McCutcheon and never asked them if they would do such work for that price (R. 307).

Respondents testified that they advised petitioner they would drill such wells at the prevailing contract price, whatever that price might be determined to be, and when this right was refused them, instituted this suit to enforce the same, the suit having been instituted about the time of the drilling by petitioner of the second well of the twenty wells drilled, and prior to the drilling by petitioner of the last eighteen wells, all of which were drilled by petitioner during the pendency of this suit. (R. 159-160). Respondents further testified that while they might not have been in position to drill the first well with a rotary, they were in position to drill, and would have drilled, the other nineteen wells with rotary (R. 206-207).

Even if it could be said, however, that the telegram from petitioner to respondents (R. 157), was an offer to respondents permitting them to do such drilling at the prevailing contract price, respondents' telegram in reply thereto (R. 158) was not a breach of the right given them under the contract to do such drilling, but simply a refusal to bid for such right—which right they already had without bidding for same—and simply questioned the right of petitioners to require the use of a rotary machine. Clearly, this comes within the rule of law set out in *10 Tex. Jur. Section 266, Page 459*, as follows:

> "* * * a contention or controversy over the terms of a contract or the construction to be placed upon it and a refusal to perform in a particular manner or in some specific feature by one of the parties, is not such a renunciation or abandonment as will authorize the other party to treat the contract as rescinded or breached. * * *"

If said telegraphed reply could be said to be a breach at all—it would have to be an anticipatory breach, we think, and in order to be an anticipatory breach, same must be a definite, unconditional breach. As said in the Texas Supreme Court case of *Moore v. Jenkins*, 211 S. W. 975:

> "But to have this effect (the effect of breaching the contract), the declaration of an intention not to perform the contract in the future must be unconditional in its terms."

The doctrine is further stated in the case of *Universal Life & Accident Co. v. Sanders*, 102 S. W. (2d) 405, a Texas Commission of Appeals case, approving

the early Texas Commission of Appeals case of *Pollack v. Pollack*, 46 S. W. (2d) 292, in which it is said:

> "The Pollack opinion limits its application to cases in which the obligor absolutely repudiates the obligation without just excuse,"

and bear in mind that, at the time of the receipt by respondents from petitioner of the telegram asking for bids with use of rotary equipment, respondents had just successfully completed on the leasehold estate the drilling of five producing wells with cable tool equipment.

Yet, even if we should assume for the sake of argument that the telegraphed reply of respondents did constitute a breach of the covenant sued on, same could relate only to the right of respondents to drill the first of the twenty wells drilled, since the preference to do future drilling at the prevailing contract price was a continuing right, an optional right, and the consideration therefor having been paid by respondents, that is, the test well provided for in the contract with Dorr having been drilled by respondents, they could refuse to drill the first well and still assert the right to drill the next well, or any of the later wells, or all of them, as the doctrine of anticipatory breach does not in fact apply to unilateral contracts, or to bilateral contracts where the injured party has already performed all that the contract required of him. *Williston, on Contracts, Second Edition, Sections 1328 and 1296.*

ARGUMENT IN SUPPORT OF POINT E

Petitioner has discussed, under Point E, in its brief, several cases which we feel logically should have been discussed under Points A and B, and which we have discussed under A and B in this brief, and that discussion is not repeated here. We will say, however, that while of necessity, the prevailing contract price was based upon the prices paid favored contractors in the area, as well as the prices paid contractors competitively bidding for the work in the area, respondents introduced testimony from both favored contractors and contractors bidding on a competitive basis (R. 213, 223, 224) and from this testimony, the jury and the court determined the prevailing contract price. In other words, the evidence admitted included prices based both on a favored contractor basis, as well as prices based on a competitive basis, so that from a consideration of all prices, the prevalent, general, recognized, customary price paid in the area could be, and was determined. Petitioner, in this connection, offered no testimony to controvert such evidence as to the existence of a prevailing contract price.

ARGUMENT IN SUPPORT OF POINT F

While it is true that there exists a general rule of law to the effect that a partner is not entitled to compensation from his co-partners for services in conducting the partnership business, unless there is a stipulation to that effect, we submit that the stipu-

lation, or provision in the contract giving respondents the right to do all future drilling at the prevailing contract price most certainly entitled them to receive such price for such drilling, and the fact that they could make a profit in the performance of the drilling at such price in no way violates the general principal of law above set out. In other words, if they were entitled to do such drilling at the prevailing contract price, they were entitled to any profits, if any, resulting to them under the price which the contract provided should be paid them. This is, in effect, the recent decision of the Texas Commission of Appeals in the case of *Greene v. Condor Petroleum Company, et al,* 140 S. W. (2d) 844, in which it was held that a joint owner of Oil and Gas Leases may accept employment from other owners holding jointly with him to render a personal service for the benefit of their joint holdings, and may enforce such contract, or agreement, against such owners.

ARGUMENT IN SUPPORT OF POINTS G, H, and I

Under Point G, petitioner urges that it has been consistently held in Texas that where one purchases real property burdened with a lien or encumbrance, such purchaser does not become liable therefor in an absence of an assumption of such obligation and petitioner cites, under this point or reason in its petition, several Texas cases. In its brief, however, it does not undertake to argue the point, or the cases cited. *Here again, the petitioner has failed, in our opinion, to indicate any conflict between the decision in the instant case*

and decisions in local cases, for the reason that, while the cases cited by petitioner are authority for the point made with reference to the assumption of liens and encumbrances, they are in no way applicable to the case at bar.

In our case there was in existence at the time petitioner purchased its undivided interest in the leasehold estate, what is termed a mining partnership, and it is most certainly true that one purchasing an interest in a mining partnership takes subject to all of the provisions of the mining partnership, whether the same are assumed or not. While the original letter agreement between respondents and Dorr did not, in itself, create a mining partnership, a mining partnership was provided for therein, which came into being after respondents drilled the test well provided for in the agreement and received by assignment from Dorr an undivided interest in the lease. The wording of the contract with Dorr implies a sharing of profits and losses, a joint operation and mutual agency, a joint sharing of expenses, and in fact refers to the enterprise as a joint venture, which terminology is used interchangeably with mining partnership in decisions relating to mining partnerships. See *Gardner, et al. v. Weisner, et al.*, 55 S. W. (2d) 1104 (error refused by Texas Supreme Court). Such provision in the contract met all the requirements of a mining partnership with the exception of a joint ownership, and this came into being upon the assignment by Dorr to respondents of an interest in the lease. See *Wagner Supply Company v. Bateman*, 18 S. W. (2d) 1952 (Tex. Sup. Ct.); *Shell Petroleum Corporation v. Caudle*, 63 Fed. (2d) 296;

Indiohoma Refining Company v. Wood, 255 S. W. 212 (Tex. Civ. App.); *Gilbert v. Fontaine*, 22 Fed. (2d) 657; *Gardner v. Weisner*, supra; *Sturm v. Ulrich*, 10 Fed. (2d) 9; *Moss and Urchell v. Clark*, 82 S. W. (2d) 1090 (Tex. Civ. App.), in which case it is said:

> "The record discloses, without controversy, that * * * appellants and appellees were co-owners of the lease, the first well already having been drilled and were jointly operating said lease with appellants in full charge of operation of the same. Under these facts, there was created as a matter of law, a mining partnership between appellants and appellees."

Not only did the letter agreement itself create a mining partnership which had its inception when respondents acquired by assignment from Dorr their undivided interest in the lease, but after the drilling of the test well by respondents, the joint action of respondents and Dorr, Gibson and Hamm, the then owners of the lease, in financing same, in sharing the profits thereof, and the expenses thereof, and in agreeing by mutual consent with reference to the location of the first wells drilled by respondents, as well as in agreeing upon the prevailing contract price, so as to determine the price to be paid respondents for drilling such wells, created a mining partnership which was then in existence at the time petitioner purchased its interest in the property, and petitioner having purchased its interest when the mining partnership was in existence, took its interest subject to, and burdened with the provisions of the mining partnership contract aforesaid and is bound thereby, it being pointed out, in this con-

nection, that a mining partnership differs from the usual commercial partnership, in that a mining partnership, once created, continues and is not dissolved by the fact that one of the partners has disposed of his interest to some outside party. Such outside party, in that event, acquires its interest in the mining partnership subject to the obligations and with the profits provided by the mining partnership. This principle of law is established in a number of the decisions above set out, and as an example of the same, we quote from *Sturm v. Ulrich*, supra, as follows:

> "Where a mining partnership is in existence, the purchase of an interest of a partner, or the purchase of an interest of a partner in the lease being mined, makes the purchaser a partner."
>
> "When a mining partnership is once created it continues and is not dissolved by the fact that one of the partners has disposed of his interest to some outside partner. What the defendants bought into when they acquired their interest in the lease in question was an undivided interest in a mining partnership and thereby secured the rights and assumed the obligations which the well established rules governing such partnerships provide."

In support of its Points H and I, to the effect that the Circuit Court of Appeals erred in holding that the covenant in the contract sued on in the instant case giving to respondents the preference right to do all future drilling at the prevailing contract price was either a covenant running with the leases, a profit a prendre, or an equitable servitude, which attached to such leases, and that such holding was an important ques-

tion of local law in conflict with applicable local and other decisions, petitioner cites a number of cases, but relies largely on quotations from textbooks set out in its brief, and on the cases of *G. C. & S. F. Ry. Co. v. Smith*, 9 S. W. 865 (Tex. Sp. Ct.); *Lakewood Heights Company v. McCuistion*, 225 S. W. 1109 (Tex. Civ. App.); *Montgomery v. Creager*, 22 S. W. (2d) 463 (Tex. Civ. App.); and *Spencer's Case*, 4 Coke 16.

The Smith case does not relate to Oil and Gas Leases, but to a covenant in a deed in which a right of way was created to a railway company, stipulating that whenever any portion of the land crossing the line of the railway should be enclosed and used for pasturage, the railway company should construct a fence on each side of the right of way. The court stated that it appeared the covenant was intended to protect livestock from injury by the railroad, rather than to confer a benefit upon the grantor and his assigns, and so did not affect the land itself.

The case of *Lakewood Heights v. McCuistion*, supra, cited and discussed by the petitioner, related to the sale of city lots, wherein it was held that the covenant of the owners of an addition to furnish to the purchaser of a lot in said addition, electricity and other utilities, terminated, and was no longer binding on the owners of such addition when the land was resold by the purchaser to a subsequent grantee.

Likewise, the case of *Montgomery v. Creager*, supra, as cited by the petitioner, concerned the sale of a filling station and the property upon which it was situated. The court held therein that the purchaser of

such station was not bound by an agreement of his vendor to purchase gasoline from the plaintiff.

Too, *Spencer's Case*, cited by the petitioner, relates to contracts of a similar nature. In other words, none of such cases relate to covenants running with an Oil and Gas leasehold estate. On the other hand, respondents cite, as authority for the theory that the covenant sued on was a covenant running with the leasehold estate, the case of *American Refining Company v. Tidal Western Oil Corporation*, 264 S. W. 335, error refused by the Supreme Court of Texas, in which it was said that:

> "It is the rule by the great weight of authority, that a covenant, or a condition which relates to the development of the mineral resources of lands in question, or work to be done thereon, or upon a royalty basis, is a covenant which runs with the land."

And in *Summers, on Oil and Gas*, in Section 553, at Page 303, it is said:

> "Express and implied covenants to drill, to reasonably develop the premises after discovery in paying quantities, and to protect the land from drainage, run with the land and can be enforced by the lessor, or his grantees, of the land or royalty interests, against the lessee and his assigns."

If the covenant to pay delay rentals or the implied covenant to reasonably develop the premises are covenants running with the land, why isn't it just as true that the covenant involved in the case before the court, which gives the respondents the right to do all future

drilling on the lease at the prevailing contract price is a covenant running with the land?

Even if the covenant should be held to be a personal covenant, however, the same would still be binding on petitioner for the reason that this case is essentially an equity case, all parties thereto, as well as the trial court, having treated same as an equity case involving equitable principles, and petitioner having purchased with notice and knowledge of the provision sued on ought to be, and is, bound thereby. In support of this theory, we cite the Texas case of *Anderson, et al., v. Rowland*, 44 S. W. 911. In that case, the agreement of a vendor of a lot not to allow the sale of intoxicating liquors in any building owned by him or afterwards conveyed in the same block in which the lot was situated for a period of five years, was held to bind grantees taking property subject to such agreement, and with notice thereof, even though such covenant was not one running with the land, the court saying:

> "It is enough that purchaser has notice of it, the question in equity being * * * not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor and with notice of which he purchased."

It is respondents further contention that the covenant giving to respondents the preference right to do all future drilling at the prevailing contract price was, at least, a profit a prendre or an equitable servitude attaching to the leases and to support this contention, we cite the cases of:

Sims v. Southern Pipeline Company, 195 S. W. 283, error refused;

Graham v. Omar Gasoline Company, 253 S. W. 896;

American Refining Company v. Tidal Western Oil Corporation, 264, S. W. 335, error refused;

Southwest Pipeline Company v. Empire Natural Gas Company, 33 Fed. (2d) 248.

The first case cited; namely, *Sims v. Southern Pipeline Company*, supra, is perhaps the leading case on the point. In that case, the plaintiff contracted to purchase a portion of all oil produced from a certain lease from one, West, the owner of the lease. West subsequently assigned the lease to Sims, who repudiated the agreement with the plaintiff. Plaintiff brought suit to obtain a temporary injunction against defendant and to secure a mandatory injunction requiring defendant to comply with the agreement. The court refused the injunction saying plaintiff's remedy at law for damages was adequate and stated:

> "It is a fair inference from this contract that the Omar Gasoline Company was to go upon the land and connect its pipes directly with the oil well thereon, and by means of vacuum extract the gas therefrom which would, perhaps, not otherwise be produced. Viewed in this light, the contract becomes in the nature of a grant of a profit a prendre, and imposed a servitude upon the property in the nature of an incorporeal hereditament, which would not lose its force or validity, although the land itself should pass to another purchaser, who, at the time of his purchase, had full notice of such servitude.

"And it might be said that a similar right is created by the casinghead gas contracts in question, and, even in the case of covenants, 'there is a growing tendency to incorporate equitable doctrines with common law rules, and in equity covenants relating to land or its mode of use or enjoyment are frequently enforced against subsequent purchasers with notice, whether named in the instrument or not, and though there is no privity of estate. Furthermore, it is immaterial in such cases whether the covenants run with the land or not; the general rule being that it will be enforced according to the intention of the parties.'"

The third case above cited, that of *American Refining Company, et al., v. Tidal Western Oil Corporation*, supra, also involved a gas contract and in this case, the contract was expressly recited to be a covenant running with the land. The court, however, went into a full discussion of the question of covenants running with the land and pointed out the ruling of Spencer's Case as the old common law technical point of view, and stated that under the new viewpoint of modern law, it made no difference whether the covenant was one running with the land or not as to whether the subsequent assignee was bound thereby.

The last case above cited, that of *Southwest Pipeline Company v. Empire Natural Gas Company*, involved a gas purchase contract and is very similar to the above Texas cases. In that case, the plaintiff contracted to purchase certain gas from wells drilled on a certain lease. Said lease was thereafter purchased by the defendant with notice and knowledge of the

contract. The plaintiff sought and obtained an injunction restraining the defendant from breaching the contract, and the defendant argued it was a personal contract and the defendant not having assumed same, was not bound thereby. The court, however, held that whether the defendant assumed the contract or not, it took with notice and knowledge of same, and that the contract created a profit a prendre, which was similar to an easement, the court saying:

> "While we are satisfied that the contract in question did create some interest in the leasehold in the nature at least of a right of profit a prendre, we do not deem it of importance as to whether such right would run with the land and the leasehold, because certain equitable rights were undoubtedly created by the contract which were enforceable according to the expressed intention of the parties against the assignee of the leasehold estate, if that assignee had notice of said rights."

The effect of the case of *Graham v. Omar Gasoline Company*, supra, is fully recognized in Summers' Oil and Gas, Volume 3, Page 305, where the Graham case is cited in support of the following text:

> "The assignee of a lease may likewise be bound by the agreements of the lessor with third persons for the sale of oil or gas produced from the lease upon the equitable theory that he bought with notice of the contract which imposed a servitude upon the property."

It might be argued that, inasmuch as these cases are considered to be, and treated as equity cases involving equitable servitude, the courts could not render

a personal judgment for damages for lost profits, as was done in the instant case, but could only give relief based on an injunction or specific performance. However, the first two of the last four cases hereinbefore listed and discussed as involving equitable relief, expressly recited that while the plaintiff was not entitled to specific performance through the medium of an injunction, he was entitled to prosecute a suit for damages. As said in the case of *Sims v. Southern Pipeline Company*, supra:

> "If when he (Simms) purchased the lease he knew that plaintiff had contracts that the oil produced from the property up to July 1, 1917, should be sold and delivered to it at the price named in the sales contract, *he would be bound by such contracts*, and the plaintiff would be entitled to recover damages for their breach, and if the facts justified such remedy to specific performance of the contracts."

Furthermore, it is a fundamental principle of equity that once jurisdiction has attached in an equity case, the court is entitled to adjust all rights and claims pertaining to the matter involved, even though it may be necessary to administer purely legal remedies. This rule is enunciated in 17 *Texas Jurisprudence*, pages 8 and 9, as follows:

> "On the other hand, if a court of equity has acquired jurisdiction of a subject of litigation and the persons whose interests are involved, it will adjust all rights and claims appertaining to the matter, leaving for future litigation nothing that can be disposed of in the exercise of equitable powers. Purely legal remedies will be administered.

"The rule is frequently applied where relief has been sought by injunction. For example, where jurisdiction has been acquired by virtue of an application for an injunction to restrain the sale of a chattel under execution, the court should hear evidence as to the rights and interests of the parties, and render such judgment as they are entitled to under the rules of equity proceedings. In such circumstances the court properly retains the cause for the purpose of decreeing damages for detention of the property by the officer and plaintiff in execution."

The case at bar originated as an equity case, respondents having first sought an injunction in the trial court, and certainly the court having proper jurisdiction of the case was authorized to render such judgment as respondents showed themselves to be entitled.

ARGUMENT IN SUPPORT OF POINT J

Under its Point J, both in its petition and its brief, petitioner urges that the Circuit Court of Appeals rendered an erroneous decision on an important point of local law, which is in conflict with the applicable local and other decisions, when it sustained the holding of the trial court to the effect that the rights and liability of the parties to this suit under the lease in question were to be determined by the law of landlord and tenant. In reply we point out first that the Circuit Court of Appeals, in holding petitioner bound by the covenant sued on, did not specifically determine whether such covenant in the instant case was a covenant running with the land, a profit a prendre, or equitable servitude, attaching to the leasehold estate, or whether, un-

der general principles of equity alone, the petitioner should be bound by the contract provision, but simply said:

> "We think it clear that when Dorr and Buffington and Smith entered into the contract they did so with the intention of burdening the lease and the development of the leasehold with a preferential right in appellees to perform all future drilling operations at the prevailing contract price. The British-American Oil Producing Company took assignments of interest in the lease with notice, actual and constructive, of the existence and terms of the preferential drilling right. It recognized the binding character of the covenant when it asked for bids for future drilling. It took its assignments subject to the contract and is bound by its terms";

and in support of such portion of its decision cited the following cases:

> *Anderson v. Rowland*, 44 S. W. 911;
> *Graham v. Omar Gasoline Co.*, 253 S. W. 896;
> *Southwest Pipeline Co. v. Empire Natural Gas Co.*, 33 F. (2d) 248;
> *American Refining Co. v. Tidal Western Oil Corporation*, 264 S. W. 335;
> *Pierce Fordyce Oil Ass'n. v. Woodrum*, 188 S. W. 245;
> *Southern Mineral Corporation v. Simmons*, 11 F. (2d) 333; 7 R. C. L. Sec. 18, p. 1101, Sec. 39, p. 1125;

some of which relate to general equitable principles, some to the doctrine of profit a prendre or equitable

servitude, and one, the case of *Pierce Fordyce Oil Ass'n. v. Woodrum*, supra, relates to the theory that, while an oil and gas lease does create a determinable fee estate and in that sense is a conveyance or sale, the liabilities and responsibilities of the parties thereto, as well as the character of the expressed and implied covenants therein, are determined by rules applicable to lease contracts and not to conveyances of land.

We respectfully submit that this case, cited by the Circuit Court of Appeals as one of the cases above set out to support the above quoted portion of its opinion, and the decision of the Circuit Court of Appeals based thereon, is not in conflict with the cases cited by petitioner in its brief of *Lamar v. Garner*, 50 S. W. (2d) 769; *Gordon v. Empire Gas and Fuel Company*, 63 Fed. (2d) 487; *Ehlinger, et al. v. Clark*, 8 S. W. (2d) 666; *Mound Valley Vitrified Brick Company v. Mound Valley Gas and Oil Company*, 268 Fed. 936; *Emerson, et al. v. Little Six Oil Company*, 3 Fed. (2d) 265; *G. C. & S. F. Ry. Co. v. Smith*, 9 S. W. 865; *Lakewood Heights Company v. McCuistion*, 226 S. W. 1109; and *Montgomery, et al., v. Craeger*, 22 S. W. (2d) 463. Of these cases so cited by petitioner, only the cases of *Lamar v. Garner*, supra, *Gordon v. Empire Gas and Fuel Company*, supra, and *Ehlinger, et al., v. Clark*, supra, specifically relate to oil and gas leases, and these three cases in no way are in conflict with the case of *Pierce Fordyce Oil Ass'n. v. Woodrum* for the reason that they do not go into a discussion as to the effect of the implied and expressed covenants of oil and gas leases, but simply hold that oil and gas leases

when executed and delivered operate as a conveyance or sale of a determinable fee estate. This doctrine of law is likewise recognized in the *Pierce Fordyce Oil Ass'n.* case, it having been the rule for some time in Texas that an oil and gas lease does create a determinable fee estate, and to that extent is a conveyance, and it is so held in the *Pierce Fordyce Oil Ass'n.* case. This case, however, involved not only the nature of the conveyance in an oil and gas lease but involved the further question as to whether or not the covenants contained therein were binding upon subsequent assignees thereof, and is therefore pertinent to the point at issue and is in support thereof, whereas the cases cited by petitioner do not purport to discuss that element of oil and gas leases; and, while the *Pierce Fordyce Oil Ass'n.* case involved a lease with an "or" clause, as distinguished from an "unless" clause, the principles involved are the same, so long as such lease is in effect. In said case the lease involved required the lessee to either drill within six months or to pay delay rentals for six months; it was assigned to the defendant, who refused to pay such rentals, and the plaintiff, the lessor in the lease, asked the defendant for the rentals provided for in the lease. The defendant contended it did not assume the payment of such rentals when it purchased the lease by assignment, that same did not constitute a covenant running with the land, and that it was not bound. The court in its original opinion agreed with the defendant that it was correct in its contention and that the case of *G. C. & S. F. Ry. Co. v. Smith*, hereinbefore cited by petitioner, was controlling. On rehearing, however, the court reversed its former judgment, holding that the Smith case was

not applicable and that the defendant, as the assignee of the lessee, was liable for such delay rentals, even though it did not assume same, and holding that, while under Texas laws an oil and gas lease creates an interest or estate in land, it is treated more nearly as a lease contract and not as a conveyance with respect to the obligations contained therein, and that the Smith case would not be applicable to an oil and gas lease but that rules applicable to lease contracts and not to conveyances of land should apply; and that the assignee, having taken with notice and knowledge of the covenant contained in the lease as to the payment of delay rentals, was bound thereby. That rules affecting lease contracts instead of conveyances of land are applicable to oil and gas leases in construing the obligations of the parties thereto, and their heirs and assigns, is further demonstrated by the well known rule established by many cases in Texas to the effect that the implied covenants in an oil and gas lease requiring the lessee to reasonably develop the premises and to protect the same from drainage run with the lease and are binding upon any subsequent assignee or purchaser thereof.

We respectfully submit that this case and the opinion of the Circuit Court of Appeals is in no way in conflict with the cases cited by the petitioner aforesaid, all of which merely hold that an oil and gas lease is a conveyance of determinable fee estate.

The case of *Mound Valley Vitrified Brick Company v. Mound Valley Gas and Oil Company*, supra, cited by petitioner, is, we think, not applicable in the instant case, and even that case, in holding the assignees of an

oil and gas lease not liable under a covenant of the assignor to furnish gas from the lease to a brick company, said: "Assignors are not bound at law, although they may be named, *but in certain instances they may be charged in equity;*" and, as hereinbefore pointed out, the case at bar was instituted as and treated as an equity case.

The case of *Emerson, et al., v. Little Six Oil Company*, supra, cited by petitioner, simply holds an oil and gas lease to be an interest in realty or a determinable fee estate.

The cases of *G. C. & S. F. Ry. Co. v. Smith*, supra, *Lakewood Heights Company v. McCuistion*, supra, and *Montgomery v. Craeger*, supra, cited by petitioner, have already been differentiated and distinguished in this brief by respondents, but we again point out that these cases in no way relate to oil and gas leasehold estates but to sales and conveyances of land, and the use thereof; the Smith case holding, for instance, that the agreement of a railway company to fence its right-of-way on land owned by the grantor was not a covenant running with the land, same being more for the protection of the livestock on the land than for the benefit of the land itself. Clearly, these cases are not in conflict with the decision of the Circuit Court of Appeals in the instant case.

ARGUMENT IN SUPPORT OF POINT K

Petitioner attempts to make the point hereunder that, as a general rule in a contractual action as distinguished from an action in equity, no action may be

maintainable between partners with respect to partnership transactions unless there has been an accounting or settlement of partnership affairs, and that the Circuit Court of Appeals, in affirming the decision of the trial court to the effect that the action in the instant case could be prosecuted, is an erroneous decision of an important question of local law which is in conflict with the applicabie local decisions. Petitioner in its argument hereunder in its brief virtually admits that a mining partnership was in existence at the time petitioner purchased its undivided interest in the leasehold estate, and such admission has the effect, in our opinion, of completely erasing the effect of the cases cited by petitioner in its argument hereunder, for the reason that all of such cases simply point out the applicability of the rule in general partnerships, and none of same involve mining partnerships, in which the rule is distinctly different. For instance, the case of *Hardee v. Adams Oil Assn.*, 254 S. W. 602, cited by petitioner, involved a suit by one stockholder in a joint stock association against the other stockholders, and the Court held that until there had been an accounting and settlement of the partnership affairs the suit could not be maintained. In this case the rules of the association expressly prohibited such a suit, although the court recognized the general rule that in a partnership of such general nature the suit could not have been maintained, even in the absence of such provision.

Likewise the case of *Brodage v. Greenwood*, 261 S. W. 453, cited by petitioner, which, incidentally, was a Court of Civil Appeals opinion and not a Texas Commission of Appeals opinion, as designated at page 54 of petitioner's brief, involved a joint stock company

or association, and the general rule was stated to the effect that one member could not sue the association for services rendered in the prosecution of the joint enterprise until he had first asserted his claim in an accounting.

In addition to these cases, petitioner cites one or two other cases from other jurisdictions, as well as commentaries from legal publications, but all of same relate only to the general rules of partnership, a mining partnership not being involved in any of the decisions.

On the other hand, the following cases clearly make the distinction that in a mining partnership the rule is different, and one partner may institute and prosecute an action against the partnership without first having an accounting or dissolving the partnership:

Gilbert v. Fontaine, 22 Fed. (2d) 657;
Indiohoma Refining Company v. Wood, 255 S. W., 212 (Tex. Civ. App.);
Moss and Urchell v. Clark, 82 S. W. (2d) 1090;
Greene v. Condor Petroleum Company, et al., 140 S. W. 844 (Tex. Comm. of App.)

Perhaps the distinction is best enunciated in the case of *Gilbert v. Fontaine*, 22 Fed. (2d) 657, supra, in which the court says:

> "It is contended by defendants that, even though a lien exists in favor of plaintiff, yet it cannot be foreclosed without a final accounting and a winding up of the affairs of the partnership. It is the general rule that an action at law involving partnership transactions cannot be maintained between partners until after an account and settlement. This rule, however, is by no means uni-

versal, even in ordinary partnerships. Thus, where there is an express stipulation in the partnership articles which is violated by one partner, an action at law will lie. And where the partnership agreement, as in the case at bar, provides for a periodical settlement of expenses, suit may be maintained therefor without seeking a dissolution of the partnership and a final account.

* * * * *

"Under these circumstances, we think this suit in equity may be maintained for a determination of the amount of the debt and for the establishment and foreclosure of the lien incident to the debt, without specifically praying for a final accounting or a dissolution of the partnership."

The rule is further enunciated in the case of *Moss and Urchell v. Clark*, wherein it is said:

"The expenditures made by appellants having been actually made in the necessary development, protection, and operation of the partnership property, appellants were authorized to bring an action at law against appellees for a contribution to the extent of one-half the actual expenditures so made, and this right is not dependent upon a general accounting between the parties. Indiohoma Refining Co. v. Wood, supra; Gilbert v. Fontaine (C. C. A.) 22 F. (2d) 657;"

plaintiffs and defendants having been in said case the joint owners of an oil and gas lease and plaintiffs having operated and developed the same with the acquiescence of the defendants.

In view of the existence of a mining partnership in

the case at bar, and in view of the distinction above made between the rule applicable to a general partnership and the rule applicable to a mining partnership, we think it is clear that the decision in the instant case in no way conflicts with the cases cited by petitioner. In this connection it is significant that the petitioner, British-American Oil Producing Company, in its cross-action against respondents, Buffington and Smith, in the trial court, asked to be reimbursed for respondents' proportionate cost of the drilling performed on the mining partnership property by the petitioner, and in this cross-action petitioner did not seek a dissolution of the partnership or ask for a general accounting, thereby impliedly acknowledging, at least, that in a mining partnership it is not necessary for one partner in suing another to ask for a dissolution and a general accounting, and incidentally thereby acknowledging the existence of a mining partnership.

ARGUMENT IN SUPPORT OF POINT L

In reply to the position taken by petitioner under its Point L in its petition and brief that the duty rested on the respondents to minimize their damages occasioned by the refusal of petitioner to permit them to drill at the prevailing contract price the wells drilled on the leasehold estate involved in this suit by obtaining other work and offsetting the profits, if any, made therefrom, respondents say herein first that in the situation involved in the case at bar there is no duty on respondents as drilling contractors to make any disclosure of or to account for the profits derived by them from other drilling operations, for the reason that drilling contrac-

tors ordinarily have a number of drilling contracts on hand at one time and usually are engaged in drilling at one time a number of wells, so that the breach of one of such drilling contracts by one owner would not require the drilling contractor to offset his damages sustained by such breach with the profits obtained in the drilling by him of the other wells under his contract. If such were the case, the drilling contractor, respondents herein, and not the owner, petitioner herein, would be the one penalized in the event of a breach of the contract by the owner. The cases cited generally by petitioner hereunder in its brief would appear to have no application. Even if it could be argued, however, that the rule that damages must be minimized by obtaining other work is applicable to the situation at bar, the burden is on petitioner and not on respondents to show the amount by which damages should be diminished, and this petitioner failed to do.

For the court's information in this connection, there are annotated in 15 *A. L. R.*, p. 768, Sec. G, three cases relating to the question of whether or not the rule requiring one to seek other employment in order to minimize damages for breach of a contract is effective as to the breach by owner of a drilling contract; these cases make it clear that the rule is not uniformly established in respect to situations of such nature. For instance, in the first case there listed, namely, the case of *Watson v. Gray's Harbor Buck Company*, 28 Pac. 527, the rule was held not to be applicable to a contract by which the plaintiff agreed to sink a well for the defendant at a stipulated price per foot, but was prevented from entering upon the work under the contract.

The second case therein listed, being the case of *Robertson v. Vandeventer*, 152 Pac. 107, holds the rule to be applicable, but apparently does so on the theory that the contract not only provided for the drilling of a well *but expressly provided for the plaintiff's personal service.*

And, while the third case therein listed is the Texas case of *Osage Oil & Refining Company v. Lee Farm Oil Company*, 230 S. W. 518 (Tex. Civ. App.), in which it is indicated that the rule might be applicable to the breach of a drilling contract by the owner, yet the court holds:

> "*But the burden is upon the defendant as to such matter*, Porter v. Burkett, supra; San Antonio Life Insurance Co. v. Griffith, 185 S. W. 338 (8), and authorities. While the evidence shows that the plaintiffs could have secured other employment for their drilling outfit, *it is not shown to what extent the damages would have been diminished thereby*, and the jury would have had no basis for a reduction of the damages on this account."

In the instant case the petitioner had ample opportunity to fully question respondents as to the nature of their other drilling operations, but wholly failed to elicit any proof of profits made therefrom. We believe the evidence shows that respondents made full and complete statements in answer to questions by petitioner's counsel, showing the nature of the other operations of respondents, and that from the evidence submitted it was impossible to determine whether any profit was made on such operations.

CONCLUSION

As indicated earlier in this brief, respondents believe that substantially the only theory advanced by petitioner for the purpose of invoking the jurisdiction of this Honorable Court is the proposition that the decision of the Circuit Court of Appeals in the instant case is an erroneous decision, in various instances, of an important question of local law and is in conflict with applicable local and other decisions.

Respondents respectfully submit to the court that in this brief they have in each and every instance clearly demonstrated that no conflicts exist and that no basis exists upon which to sustain and support the jurisdiction of this Honorable Court in the instant case.

Respondents respectfully pray that the petition and writ of certiorari be denied, and for such other relief to which they may be entitled.

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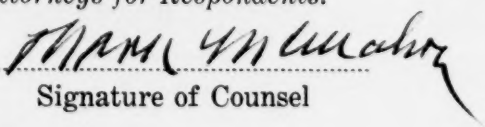

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